UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

COGNIS AND COGNIS OLEOCHEMICALS, LLC [1]/

Employer

and Case 9-RD-2112

PATRICK S. LOFLIN, AN INDIVIDUAL

Petitioner

and

UNITED STEELWORKERS OF AMERICA,
LOCAL 14340, AFL-CIO-CLC [2]/

Union

# REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

## I. INTRODUCTION

The Employer, a corporation engaged in the business of processing chemical products at its Cincinnati, Ohio facility, and the Union and its predecessor entities have had a collective-bargaining relationship for many years. The most recent contract between the parties was effective by its terms from the first Monday of February 2001 through February 2, 2004, with an additional year extension of the contract to February 7, 2005. [3]/ The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to decertify the unit comprising of all production and maintenance employees, storeroom employees and boiler house employees, but excluding supervisors, assistant supervisors, and all other employees who have authority to hire and

[1]/ The name of the Employer appears as amended at the hearing.

[2]/ The name of the Union appears as amended at the hearing.

[3]/ The Employer was created as a result of an organizational change that occurred on about July 2005. The former entity was known as Cognis Corporation. A change also occurred with respect to the Union on about April 14, 2005, when the United Steelworkers of America merged with PACE International Union to form the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. The Employer recognizes the Union as the collective bargaining representative of the employees in the unit described herein and the parties stipulated that the merger described above has no impact on this proceeding or the Union's collective bargaining relationship with the Employer.

discharge, salesmen, office and clerical employees, laboratory employees, employees of the Engineering Department, nurses, guards, railroad yard checker, administrative and executive employees employed by the Employer at its 4900 Estee Avenue, Cincinnati, Ohio facility. [4]/ The unit consists of approximately 270 employees. The parties stipulated that on or about February 7, 2005, the employees represented by the Union commenced a strike at the Employer's Cincinnati, Ohio facility. The parties also stipulated that the strikers are economic strikers and that they have engaged in the strike in excess of 12 months.

There appears from the record and the briefs of the parties that there are two basic issues for me to resolve. Initially, whether the Employer has met its burden to establish that the replacements hired during the strike are permanent employees. Secondly, I must decide whether the Employer has met its burden of establishing that the strikers who were not replaced are ineligible to vote because their positions have been eliminated.

The Employer asserts that all of the economic strikers who have not already crossed the picket line have been permanently replaced and that the only eligible voters in the decertification election are the permanent replacement employees and those striking employees who crossed the picket line to return to work. The Union, contrary to the Employer, contends that all of the replacement employees, including crossovers, are temporary, not permanent, and as such, the economic strikers are eligible voters and the replacements and crossovers are not eligible to vote. Finally, the Union contends, in any event, that approximately 50 striking employees who were not replaced are eligible to vote because the Employer did not meet its burden establishing that their jobs had been eliminated.

I find, for the reasons described below, that the replacement employees were hired as permanent employees and their status has not been altered by any subsequent event. Accordingly, I conclude that they are eligible voters as are the striking employees who crossed the picket line and returned to work at the Employer's facility. Additionally, I find in agreement with the parties, that the striking employees are economic strikers who have been on strike in excess of 12 months. Because they have been engaged in an economic strike in excess of 12 months and have been permanently replaced, I conclude that they are not eligible to vote.

In reaching my determination on these issues, I have carefully considered the record evidence and the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on these issues, I will discuss the dispositive facts surrounding the strike and the Employer's hiring of replacement employees. The facts will be followed by my analysis of the issues in relation to the applicable legal precedent.

[4]/ The unit appears as amended at hearing and stipulated to by all parties.

## II. FACTS

As stipulated by the parties, and as established by the record, following the onset of the strike on February 7, 2005, the Employer commenced hiring strike replacements beginning at the end of February 2005 and it currently employs about 161 replacement employees. Applicants to replace striking employees were handed a document that detailed information about the positions for which they were applying. The information was also read to applicants prior to their job interview. The document states, in part, that: "The positions we currently have available are as permanent replacements (as that term is used under the National Labor Relations Act) for those employees who are on the economic strike." Additionally, the document states: "The positions we now have available are not temporary positions. When the strike is over, it would be our intention to retain the individuals we hire unless, in the unlikely event, we are required to do otherwise at sometime in the future by a decision of the National Labor Relations Board, a court or by a strike settlement agreement." The information sheet was signed by almost all of the striker replacement employees acknowledging that they had read the information on the document.

After signing the document, all replacement applicants completed a generic application that has been historically used by the Employer in its hiring process. Indeed, the same application was completed by striking employees when they initially applied for employment. The application contains four boilerplate paragraphs above the signature line in small type. Paragraph 3 of this boilerplate language reads:

> I hereby agree that, if I receive this appointment, my employment may be discontinued, at the discretion of my employer or myself, at any time and that remuneration is to be paid only for services rendered to the time of said discontinuance (the foregoing being subject to any contractual or statutory restrictions). No promises regarding employment have been made to me, and I understand that no such promise or guarantee is binding upon Cognis Corporation unless it is made in writing and signed by a Cognis Corporation officer.

Replacement applicants whom the Employer determined to hire received an oral offer of employment that was followed by a written confirmation letter. That letter contains language similar to that which was provided to employees who were interviewed for replacement positions. The relevant language is as follows: "The position you are being offered is as a permanent replacement (as that term is used under the National Labor Relations Act) for some of our employees who are on an economic strike. The position is not temporary. When the strike is over, it is our intention to retain you in the position, unless, in the unlikely event, we are required to do otherwise by a decision of the National Labor Relations Board or court, or a strike settlement agreement." The letters were signed by the replacement employees who accepted positions with the Employer.

On May 13, 2005, the Employer mailed a letter to all replacement employees that it had hired to that point in time and who were actively employed. The letter states, in relevant part:

> At the time of your hire, we agreed that you were being hired as a permanent replacement, as that term is used under the National Labor Relations Act, for employees who are on an economic strike. We also explained that the position was not temporary, and when the strike is over, it is the Company's intention to retain you in your positions unless ordered otherwise by the NLRB or a court or pursuant to a strike settlement agreement.
>
> We have now hired replacement workers for all but a few open and available jobs that are needed to operate our facilities. We wanted to reconfirm our agreement that when the strike is over, we will retain you in your job as a permanent replacement for the striking employees. Replaced strikers will be placed on a preferential recall list in the event there are job openings in the future. We also want to tell you now, that we have hired all replacements, we do not intend to enter into a strike settlement agreement that would affect your position as a permanent replacement for the strikers. That status would only be affected by an order from a court of law some time in the future if the issue arises. (emphasis in original)

As of the date of the hearing, about 60 bargaining unit employees had crossed the picket line and returned to work. The record reflects that the Employer's Cincinnati operation is fully staffed by 161 replacement employees, about 60 "crossover" employees, and an additional 10 replacement employees who had accepted job offers and were expected to commence their employment in July 2006. Arguably, approximately 50 jobs, previously filled by striking employees, have apparently been eliminated. At the time of the hearing, there were no job openings at the Employer's Cincinnati operation.

The record discloses that the Employer has held regular meetings with the replacement and crossover employees during the strike. However, the record does not detail the number and timing of these meetings. These meetings were conducted by corporate officers including: President of Cognis Corporation, Paul Allen; then Vice-President of Oleochemicals, Guy Penard; and, by CEO for Cognis Global, Antonio Trius. At these meetings, the workforce was informed about the status of the business and were thanked for their efforts in keeping the Employer in business. Finally, the replacements were reassured that the Employer intended to keep them on a permanent basis following the cessation of the strike.

## III. THE LAW AND ITS APPLICATION

It has long been held that economic strikers who have been on strike in excess of 12 months and who have been permanently replaced are ineligible to vote in an election. *Wahl Clipper Corp.*, 195 NLRB 634 (1972); *Thoreson-McCosh, Inc.*, 329 NLRB 630 (1999). However, economic strikers who have been on strike in excess of 12 months retain their eligibility to vote if they have not been permanently replaced. *Gulf States Paper Corporation*, 219 NLRB 806 (1975); see also, *Erman Corporation*, 330 NLRB 95 (1999). Moreover, the Board has held that the Employer bears the burden of proving the permanent status of the replacements. *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995); see also, *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002). "Significant in meeting

this burden is an adequate showing that there was a mutual understanding between the employer and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373 (1997) enf'd. 172 F.3d 921 (D.C. Cir. 1998); *O.E. Butterfield*, supra; *Harvey Manufacturing*, 309 NLRB 465, 468 (1992).

Applying the above precedent and applicable principles to the subject facts, I conclude that the Employer has established that all of the replacement employees hired during the strike were employed on a permanent rather than a temporary basis. In this regard, I note that the Employer's communications to replacement applicants and newly-hired replacements and concerning the permanent nature of their employment was uniform and consistent. Thus, applicants were advised orally and in writing that, "The positions we currently have available are as permanent replacements . . . ," and applicants to whom employment offers were extended were advised in writing that, "The position you are being offered is as a permanent replacement . . . ." Finally, replacements and were reminded in writing that, "At the time of your hire we agreed that you were being hired as a permanent replacement . . . . " Based on these communications, the replacement employees clearly understood that they were being hired as permanent employees. In this connection, the replacements signed acknowledgments as applicants and offerees reflecting their understanding that the positions interviewed for and obtained were permanent and not temporary in nature.

Each of the communications to applicants, offerees, and actively employed replacements contained limited and concise conditions subsequent that could affect the permanent nature of their positions with the Employer. As the Employer explained, "When the strike is over, it is our intention to retain you in the position unless, in the unlikely event, we are required to do otherwise by a decision of the National Labor Relations Board or court, or a strike settlement agreement." By the May 13, 2005 letters to replacements, the Employer expressly removed some of these possible conditions by stating that, "we do <u>not</u> intend to enter into a strike settlement agreement that would affect your position as a permanent replacement for the strikers. That status would only be affected by an order from a court of law some time in the future if the issue arises."

Initially, I note that these statements defining the permanent nature of the employment relationship between the Employer and the replacements are merely explicit expressions of the legal status enjoyed by permanent replacements. Thus, in conformity with the legal status afforded replacements, the Employer has defined the permanent nature of any offer made to replacements, thereby insulating itself from potential civil actions brought by replacements displaced by operation of law, including a strike settlement reached through good faith bargaining. The types of limitations expressed by the Employer in this matter have been approved by the Supreme Court as not adversely affecting the permanent nature of striker replacements. *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172 (1983). In *Belknap*, the Court stated: "An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike." *Belknap, Inc. v. Hale*, 463 U.S. at 503. The Court majority went on to state: "That the offer and promise of permanent employment are

conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional. 463 U.S. at 504, n. 8.

As previously noted in my discussion of the facts, such communications between the Employer and replacements establishing a mutual understanding that the replacements were hired on a permanent basis are buttressed by the Employer's oral commitment of permanency to the replacements by high ranking corporate officers in multiple meetings with large groups of employees and by the Employer's repeated refusal during negotiations with the Union to agree to displace the replacements in favor of returning strikers at the conclusion of the strike. Although the Employer used the term "intention" in describing the permanent nature of the offer and terms under which replacements were employed and included the boilerplate "At Will" language in generic employment applications filled out by replacements, these factors do not materially alter the permanent nature of the offer and do not militate in favor of a conclusion that the replacements were hired on a temporary basis. Indeed, I have fully considered all of the facts surrounding the Employer's employment of replacement employees and concluded that the evidence clearly supports the conclusion that the Employer and the replacements mutually understood and considered their employment relationship to be permanent. Thus, the Employer has met its burden of establishing that the replacement and crossover employees are permanent. Accordingly, I find that the replacement and crossover employees are eligible to vote in the decertification election. Additionally, in accordance with long established Board precedent, the remaining economic strikers, who have been permanently replaced, are not eligible to vote.

In making my findings of fact and conclusions of law detailed above, I have carefully considered the evidence relied on by the Union and the Employer, the arguments of law advanced by each party, and the cases cited in support of their respective positions.

## IV. THE UNION'S BRIEF

Although the Union's theory is cogently advanced, I am not persuaded that it is controlling. [5]/ From a factual standpoint, the vast weight of the evidence clearly shows that the replacements were hired as permanent replacements and the cases relied on in support of the Union's theory are inapposite. The Union advances three principal arguments in its brief concerning the supposed temporary nature of the replacements hired by the Employer. All three arguments are intertwined. Additionally, the Union advances an alternative theory in which it contends that, in any event, about 50 striking employees have not been permanently replaced and that they are, therefore, eligible voters.

[5]/ The Union urges me to draw an adverse inference from the Employer's failure to call a replacement employee, including the decertification petitioner, to testify about the permanent versus temporary nature of the replacements' employment. I note that the employees, including the petitioner who was present in the hearing room, were equally available to all parties and that the Union could have called one or more replacement employees to the witness stand had it chosen to do so. It is settled that bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling a bystander employee. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), aff'd on point, 123 F.3d 899, 907 (6th Cir. 1997). Moreover, in the instant case, the Employer may have elected not to call any replacement employees because it determined that no additional proof on the issue was necessary. See, e.g., *KBMS, Inc.*, 278 NLRB 826, 848-849 (1986).

With regard to its principal assertions the Union contends first that there was a lack of mutual understanding between the replacements and the Employer regarding the permanent or temporary nature of their employment. Second, it is the Union's contention that the employment applications established the "At Will" status of the applicants and compels a finding that they are temporary. Third, the Union contends that in addition to the "At Will" status of the replacements that the Employer reserved "numerous escape clauses" which demonstrate that the Employer, "purposefully intended to keep its options open with respect to whether the replacements would be temporary or become permanent employees." *Target Rock*, supra at 375.

Specifically, the Union relies on *Consolidated Delivery*, supra; *Hansen Brothers Enterprises*, 279 NLRB 741 (1986); and *Associated Grocers*, 253 NLRB 31 (1980) in support of its position that the mutual understanding of permanent status between the Employer and the replacements is lacking here. The cases cited by the Union are clearly distinguishable on their facts from the subject case.

In *Consolidated Delivery*, the employer defended its failure to reinstate striking employees by claiming that they had been replaced because it had permanently subcontracted their work to a labor supplier. *Consolidated Delivery* differs from the subject case in that there was no evidence that the individual workers supplied by the labor subcontractor in *Consolidated Delivery* were permanent replacements and there was no evidence that the labor supplier itself had been retained by the employer as a permanent subcontractor. The Board noted that such evidence could have been obtained through the testimony of the replacement employees or representatives of the subcontractor. In *Consolidated Delivery*, the Board did not suggest that the evidence of mutual understanding, based on a clear written trail, like here, communicating permanent status, should be ignored. Without belaboring the point, the record here is replete with evidence that the Employer palpably communicated to the replacements that they were being hired on a permanent basis and such communications were acknowledged by the replacements. Viewed objectively, a reasonable person would have understood that he/she was being retained on a permanent basis.

In *Hansen Brothers*, supra, the evidence supporting a conclusion that replacements were hired on a permanent basis is much weaker and much more equivocal than the evidence here. Thus, the employer in *Hansen Brothers*, to establish the permanent nature of the replacements, relied on a letter it sent to strikers that they "may" lose their right to reemployment if a replacement was hired for their position and statements to replacements by an employer representative that he "wanted" to consider the replacements as permanent employees. The evidence in *Hansen Brothers* that the employer had made statements indicating its intention to keep the replacements, established, at most, as noted by the Board, the employer's intent to permanently employ the replacements and did not establish a mutual understanding as to the replacements status. Here, the Union maintains that the Employer's position during negotiations that it intended to retain the replacements at the conclusion of the strike showed only the Employer's intent and did not establish that the replacements were permanent employees. However, the evidence going to the Employer's intent was offered to establish that the evidence as a whole supports the message of

permanent employment. Moreover, as previously noted, the correspondence evidence as well as other record evidence clearly establish the mutual understanding requirement.

In *Associated Grocers*, supra, the Board found that the employer failed to establish a mutual understanding between it and some of the replacements regarding the permanent nature of their employment because the employer in that case *failed to send those replacements letters in which they acknowledged the permanent nature of their employment.* Thus, with respect to the replacements who did not receive the letter permanency was established only in the mind of the employer's representative and this was insufficient to show mutual understanding. *Associated Grocers*, 253 NLRB at 32. For the purposes of analyzing this case, it is significant that the Board in *Associated Grocers* found that as to those replacements who had received and acknowledged a letter from the employer treating them as permanent employees, the employer had met its burden to establish, "a mutual understanding and commitment on the permanent nature of their employment." Id. Here, unlike in *Associated Grocers*, all of the replacements received and acknowledged a letter detailing the permanent nature of their employment. Accordingly, *Associated Grocers* supports, rather than contradicts, my conclusion that the replacements hired by the Employer are permanent.

The Union's second and third contentions that the replacements here are temporary are based almost entirely on the Union's interpretation of the Board's decision in *Target Rock.* I disagree with the Union's interpretation and find *Target Rock* clearly distinguishable from the subject case. *Target Rock* resulted from an unfair labor practice complaint alleging that the employer violated Section 8(a)(1) and (3) of the Act by refusing to reinstate strikers following their unconditional offer to return to work. In finding a violation, the administrative law judge concluded that the employer failed to meet its burden of establishing that the replacement employees involved were hired as permanent employees for the economic strikers. The Board affirmed the administrative law judge's finding that there was a substantial showing that the replacements did not understand that they were hired as permanent employees and that the employer did not intend for them to be hired on that basis. In reaching this conclusion, the Board considered the context of the statements and the entirety of the circumstances surrounding the employer's hiring of the replacements.

In *Target Rock*, the circumstances considered by the Board in concluding that the evidence as a whole undermined, rather than supported, the message of permanent employment status for striker replacements, included:

- The fact that the great majority of the replacements applied to the employer after responding to an advertisement that stated in part, "All positions could lead to permanent full-time after the strike."

- The fact that on being hired the replacement employees were told that, "You are considered permanent at-will employees unless the National Labor Relations Board considers you otherwise, or a settlement with the Union alters your status to temporary replacement."

- The fact that the application for employment form contained employment-at-will language.

- The fact that there was no probative evidence concerning the employer's eligibility requirements (vis-à-vis the replacements) for benefits.

- The fact that in negotiations occurring during the strike the employer stated that replacements were temporary and they would be discharged if the parties reached agreement on a contract and the strikers were called back.

- The fact that on other occasions the employer's counsel told the union that the replacements would be discharged if the union made an unconditional offer to return to work and the employer's human resources director referred to the replacements as temporary and stated that they would be discharged when the strikers returned to work.

- The fact that the replacements had doubts concerning the permanent nature of their employment for months following their hire and the employer's reassurances were couched in somewhat equivocal language which was inconsistent with its advertisements for the positions.

The subject case does not contain the same type of equivocal language regarding the permanent nature of the replacement employees. Indeed, *Target Rock* contained language, contrary to the situation here, rebutting the permanency status of the replacements. Thus, the replacements here were not told at any phase of the hiring process, like the replacements in *Target Rock*, that "all positions could lead to permanent full-time after the strike." Rather the replacements here were told even during their interview that, "The positions we now have available are not temporary positions." Additionally, "When the strike is over, it would be our intention to retain the individuals we hire . . . ." Here, the term permanent is not used in conjunction with "At Will" in advising replacements as to the terms under which they are being hired. To the contrary, the only "At Will" language involved in the instant matter is that contained on generic application forms in boilerplate small type. Although this is similar to the situation in *Target Rock*, the "At Will" language here, under the other circumstances, is not sufficient to establish that the replacements were not permanent.

This case also differs from *Target Rock* in that there is evidence that replacements are eligible for and are receiving a wide range of benefits including holidays, vacations, funeral leave, jury duty, 401(k) with Employer contributions and pension. No such evidence existed in *Target Rock*. Id at 375. Additionally, unlike *Target Rock*, the evidence here reflects that the Employer consistently took the position that the replacements were permanent during negotiations with the Union and during its communications with the replacements and crossover employees. In *Target Rock* the employer made it quite clear that it would discharge the replacements if the parties reached agreement on a contract and the strikers were called back. Id at 374. Finally, unlike *Target Rock*, there is no evidence here that the replacements harbored any doubts about the permanent nature of their employment. Moreover, the Employer's May 13, letter, unlike

the communication to replacements in *Target Rock*, further emphasized the permanent nature of the replacements employment by removing the possibility of an adverse impact to their employment as a result of a strike settlement. Id at 374 – 375.

Applying the rationale of *Target Rock*, I find that "the evidence as a whole support[s], rather than undermine[s], the message of permanent employment, and that that message [was] so understood by the replacements." At its core, the Union argues that the issue to be decided is whether the Employer's failure to modify the boilerplate language of the generic employment application by a written statement to the replacement employees signed by a corporate officer constitutes a fatal flaw to the mutual understanding between the replacements and the Employer to consider and characterize the replacements as permanent rather than temporary. Such an analysis, in my opinion, misapprehends the true import of the boilerplate "At Will" language in considering the permanent versus temporary nature of the employment relationship. In my opinion, *Target Rock* does not hold that the use of "At Will" language on an application makes a replacement employee temporary where other facts demonstrate permanency. Here, the query is not whether the Employer's repeated characterization of the replacements as permanent and repeated assurances that it intended to retain the replacements following the cessation of the strike technically converted the replacements to a status other than "At Will" as they would typically enjoy. Rather, the query is whether the Employer and the replacements had a "mutual understanding" that the nature of the replacements employment was permanent notwithstanding the boilerplate "At Will" language of the employment applications. Clearly, the evidence demonstrates overwhelmingly that they had such an understanding. [6]/

There remains for consideration the Union's argument that, in any event, 50 of the striking employees remain eligible to vote because they have not been replaced. In support of this contention the Union relies on the Board's decision in *Gulf States*, supra. In *Gulf States*, there were 124 employees in the unit at the commencement of the strike and out of that number, 27 employees abandoned the strike and returned to work and 11 employees voluntarily terminated their employment. Of the remaining 78 employees on strike, 43 had their positions filled by permanent replacements and 35 strikers had not been permanently replaced. The Board held that unreplaced economic strikers retained their eligibility to vote even though they had been on strike longer than 12 months. Thus, the Board found that the 35 strikers who had not been replaced retained their voting eligibility.

[6]/ The Union's reliance on *Covington Furniture Manufacturing Corp.*, 212 NLRB 214, 220 (1974) is misplaced. As the Union noted, the Board in *Covington* held that, ". . . the employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses." Id at 220. As discussed herein, the Employer made such a commitment here.

In the subject case, the evidence establishes that the vast majority of the replacements were hired in the first half of 2005. [7]/ At the time of the hearing, only one replacement employee had been hired in 2006 and that employee had been hired on March 20, 2006. In addition, the Employer expected ten additional employees to join its workforce in July 2006. The evidence shows that these individuals had already accepted offers from the Employer. This would bring the Employer's current workforce to about 231 employees. Moreover, unrebutted evidence in the form of the Employer's response to a Union information request shows that as of May 16, 2005, the Employer had hired 210 employees as replacements with a breakdown of 162 employees in production positions and 48 employees in maintenance positions. As of that date, a total of 20 striking employees had crossed the picket line, and an additional 40 employees later crossed the picket line bringing the total employee complement to approximately 270 employees (210 replacement and 60 crossover employees). Obviously, some of the replacements quit or were terminated by the Employer as the number of replacements today is markedly less and the Employer has hired additional replacements following May 16, 2005, albeit few in recent months. As noted, the record discloses that the Employer had a full employee complement as of the date of the hearing, including those employees who had recently accepted employment offers. The Employer is fully staffed and there are no current job openings in its Cincinnati operation. In this regard, I note that the employing entity that now exists differs from the one that existed at the onset of the strike. Thus, internal reorganization has created a dual entity with a separate employment structure. However, the precise impact, if any, of this restructuring is not detailed in the record. In sum, contrary to *Gulf States*, I find that the record evidence here supports the conclusion that all of the striking employees have been permanently replaced. Accordingly, I do not adopt the Union's alternative argument seeking eligibility for 50 of the striking employees.

## V. SUPERVISORY EXCLUSIONS FROM THE UNIT

The record shows and I find that the following persons are supervisors within the meaning of the Act: Director of Human Resources, Richard A. Wagner; Operations Director, Robert Squires; and Plant Managers, Michael Bizzarro and Douglas daSilva Rosa. Accordingly, I will exclude them from the unit found appropriate.

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[7]/ The Union urges me to disregard the record evidence detailing the 2005 unemployment proceedings relating to the strike. The hearing officer in that proceeding awarded the strikers unemployment compensation based on his conclusion that they had been permanently replaced. The Union contends that the unemployment proceedings are irrelevant to this matter as they relate solely to interpretation and application of the State of Ohio's unemployment compensation law. In support of its contention the Union also argues that evidence available to it now was not available at the time of the unemployment proceeding, specifically the employment applications. Accordingly, the fact that the Union now takes a different position than it took in the unemployment proceedings regarding the permanent versus temporary nature of the replacements employment should not prejudice its case before me. I have not relied on the 2005 unemployment proceedings in reaching my findings and conclusions in this matter. I note, however, that the Board has long held that decisions of state unemployment agencies, while not controlling, have some probative value and are admissible into evidence. See, *Western Publishing Co.*, 263 NLRB 1110 (1982); *Duquesne Electric*, 212 NLRB 142 (1974). Accordingly, the hearing officer did not commit an error by accepting this evidence into the record.

## VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, storeroom employees and boiler house employees, but excluding supervisors, assistant supervisors, and all other employees who have authority to hire and discharge, salesmen, office and clerical employees, laboratory employees, employees of the Engineering Department, nurses, guards, railroad yard checker, administrative and executive employees employed by the Employer at its 4900 Estee Avenue, Cincinnati, Ohio.

## VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Steelworkers of America, Local 14340, AFL-CIO-CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have

been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 19, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 26, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 12th day of July 2006.

/s/ Gary W. Muffley, Regional Director

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

## Classification Index

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